

# In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1338

COLEMAN-AMERICAN COMPANIES, INC.,  
*Petitioner,*

vs.

UNITED STATES OF AMERICA,  
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JAMES R. WYRSCH  
1050 Home Savings Building  
1006 Grand Avenue  
Kansas City, Missouri 64106

BERNARD CRAIG, JR.  
LEVY AND CRAIG  
400 Walnut Street Building  
916 Walnut  
Kansas City, Missouri 64106  
*Attorneys for Petitioner*

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Petitioner, Coleman-American Companies, Inc., petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

## OPINIONS BELOW

The opinion of the Court of Appeals (App. A, *infra*, pp. A1-A3) is unpublished and will not be reported.

## JURISDICTION

The judgment of the Court of Appeals was entered on January 31, 1979. Petitioner did not file a motion for rehearing or rehearing en banc. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the decision of the appellate court, affirming the trial court, granting disclosure of certain grand jury documents for use in court proceedings, prior to indictment and while the grand jury proceedings were still ongoing, is in conflict with an applicable decision of this court and with applicable decisions of other courts of appeals, to-wit:

(a) As to documents which are otherwise subject to an audit by an administrative agency of the United States,

(1) whether the trial court may order disclosure of grand jury documents without a showing of particularized need;

(2) whether the holding of the *Interstate Dress Carriers* case, 280 F.2d 52 (2nd Cir. 1960), may be applied to permit disclosure

(3) (a) when there is an ongoing grand jury investigation; (b) when there is proof that the ongoing grand jury investigation has been subverted; (c) when Rule 6(e), Federal Rules of Criminal Procedure does not authorize disclosure of grand jury documents even when such documents are otherwise subject to audit and inspection by an administrative agency;

(b) As to documents which are not otherwise subject to audit by an administrative agency of the United States, whether the trial court may order disclosure of such documents

(1) when the only showing of "particularized need" by the United States was that it was administratively convenient for the Department of Health, Education and Welfare to use such documents;

(2) when there was an offer of proof rejected as irrelevant by the trial court showing that the grand jury process had been subverted by improper disclosure of grand jury documents by the Government;

(3) when there was no showing that such documents would be used in a "judicial proceeding" within the meaning of Rule 6(e), Federal Rules of Criminal Procedure.

2. Whether the decision of the appellate court (not discussed in its opinion) granting Petitioner leave to appeal the decision of the trial court under the provisions of 28 U.S.C. 1651, or under the provisions of 28 U.S.C. 1292(b) is in conflict with decisions of other courts of appeals.

## STATUTORY PROVISIONS INVOLVED

Rule 6(e), Federal Rules of Criminal Procedure.

(e) Secrecy of Proceedings and Disclosure.—

(1) General Rule.— A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the Government, or any person to whom disclosure is made under paragraph (2) (A) (ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of rule 6 may be punished as a contempt of court.

(2) Exceptions.—

(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury,

other than its deliberations and the vote of any grand juror, may be made to—

(i) an attorney for the government for use in the performance of such attorney's duty; and

(ii) such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce Federal criminal law.

(B) Any person to whom matters are disclosed under subparagraph (A) (ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce Federal criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made.

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding; or

(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

(3) Sealed indictments.— The Federal magistrate to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. Thereupon the clerk shall seal the indictment and no person shall disclose the issuance and execution of a warrant or summons.

Title 28, U. S. Code, Section 1292 (b).

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial grounds for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

Title 28, U. S. Code, Section 1651.

#### Section 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

## STATEMENT

### (a) Procedural History:

Petitioner Coleman-American Companies, Inc. (hereinafter "Coleman") appealed from an order of August 10, 1978 of the Honorable William Becker, Senior Judge of the United States District Court for the Western District of Missouri, which order permitted the disclosure of certain grand jury materials to the United States of America (Appellee) for use purely by the Department of Health, Education & Welfare and attorneys representing that Department, both in connection with one pending lawsuit and in connection with certain other administrative proceedings. On August 24, 1978, Judge Becker entered his order granting a certification under Title 28, Section 1292(b) so as to permit Coleman to pursue an interlocutory appeal of his order. On September 5, 1978 Coleman petitioned the United States Court of Appeals for the Eighth Circuit for an order permitting an interlocutory appeal, or in the alternative, for a writ of mandamus. On September 22, 1978, that Honorable Court entered its order permitting Coleman to take an interlocutory appeal.

### (b) History of This Case in the Trial Court:

On June 22, 1978, the United States of America filed an "Application for Court Order Allowing Disclosure of Matters Occurring Before a Federal Grand Jury" with suggestions in support, hereinafter referred to as "Application" or "Suggestions" (June 22, 1978).<sup>1</sup> On June 22,

1. The Record in this case consists of the pleadings filed by the parties, hereinafter referred to by the title of the pleading with the date filed, e.g., "Application filed June 22, 1978"; the Transcript of the Hearing before Judge Becker on June 26, 1978, hereinafter "Tr. p. ...."; and the orders of Judge Becker, hereinafter referred to by date, e.g., "Order, June 22, 1978."

1978, the Honorable William Becker, Senior Judge of the United States District Court for the Western District of Missouri, entered an "Order for Hearing on Application for Order Allowing Disclosure." On June 26, 1978, a hearing was held before Judge Becker on the Government's "Application" (Transcript of Proceedings of June 26, 1978). Prior to this hearing, the Court ordered that a copy of the Government's Application be served upon all interested parties, including Coleman (Tr. pp. 2, 3, 33, 46-47) and also permitted Coleman to appear at the hearing in opposition to the motion (Tr. pp. 2-3, 47).

The Government sought in its "Application" an order of the Court permitting disclosure of certain categories of documents pursuant to Rule 6(e)(2)(C)(i) of the Federal Rules of Criminal Procedure.<sup>2</sup> The Application sought disclosure of (a) "certain documents which may be considered to have been provided to the Grand Jury pursuant to a subpoena issued May 21, 1976 to James F. Coleman, with a return date of June 15, 1976 . . ." (Application, p. 1); (b) "certain documents which may be considered to have been produced pursuant to Grand Jury subpoena issued July 22, 1976, to Home State Bank, with a return date of July 27, 1976 . . ." (Application, p. 2); (c) "certain knowledge of Federal Agents who may be considered to have assisted the Grand Jury and the office of the United States Attorney in the investigation by examining various records at 3435 Broadway, Kansas City, Missouri 64111, which records were located outside the Grand Jury at the times of such investigation or examination . . ." (Application, pp. 2-3).

2. The Rule as pertinent to this proceeding provides that disclosure of matters occurring before the grand jury may be made "(i) when so directed by the court preliminarily to or in connection with a judicial proceeding. . . ."

As an alternate theory, the Government sought disclosure from the Court as to certain of the documents which, it believed, it had a right to examine pursuant to 45 C.F.R. 177.62(d), these documents, the Government urged, being not "matters occurring before the Grand Jury" under the holding in *U.S. v. Interstate Dress Carriers, Inc.*, 280 F.2d 52 (2nd Cir. 1960) (Application, Suggestions in Support, pp. 2-4). As to documents other than the Government felt it had a right to examine pursuant to regulations, the Government urged the Court to grant disclosure under Rule 6(e) (2) (C) (i) on the basis that it had or could show to the Court a "particularized need" for such documents (Application, Suggestions, pp. 4-7).

At the hearing held before Judge Becker, the parties discussed as to which of the Grand Jury documents were in fact subject to inspection pursuant to 45 C.F.R. 177.62(d) (Tr. pp. 7-15, 17-20, 26, 31-32, 34-37). Ultimately, the Court granted disclosure as to certain of the documents as "not being matters occurring before the Grand Jury", pursuant to the holding in the *Interstate Dress Carriers* case, cited *supra* (Order of August 10, 1978, para. 2, and Exhibit A to the Order). As to the other Grand Jury documents for which disclosure was sought, the Court found a "particularized need" and ordered disclosure to the Government (Order of August 10, 1978, para. 3, pp. 2-4).

It was agreed and stipulated between the parties that the Grand Jury investigation of Coleman was still continuing, with witnesses scheduled to appear in the near future (Tr. pp. 43-44, 54-55).<sup>3</sup>

3. The Grand Jury investigation continues, as witnesses and documents were subpoenaed to the Grand Jury by the Government as late as February, 1979.

The factual basis for the Government's assertion that it had a "particularized need" for the grand jury documents was that there was pending a "judicial proceeding" entitled *Edutronics Systems, International, Inc. v. Department of Health, Education and Welfare* (hereinafter "HEW"), a civil matter pending in the U. S. District Court for the Western District of Missouri. The Government also sought disclosure "preliminarily to certain judicial proceedings in said Court which will or may be filed by the Commerce Bank of Kansas City, the American Bank & Trust Company, the American National Bank, the Broadway National Bank, Civic Plaza National Bank, Douglas State Bank, Westgate State Bank, Home State Bank, all of which have filed administrative claims with this applicant." (See Application, p. 1, Tr. pp. 5-6; 28-31). Edutronics was identified as a subsidiary of Coleman (Tr. p. 28). The Government indicated that its purpose in seeking disclosure was convenience, i.e., it did not want to have to spend additional time and expense in reauditing Coleman (Tr. pp. 34-35; 37).

Coleman offered to prove that the Grand Jury process had been subverted, in that documents for which disclosure was sought had already been used by civil agents of "HEW" (without a court order) in settling claims with the American National Bank of St. Joseph, Missouri, said claims being civil in nature. This offer of proof was rejected by the Court as being irrelevant (Tr. pp. 38-47; 21-22; Coleman's Initial Suggestions in Opposition to the Application for Disclosure, pp. 2-3).

After the Court entered its Order on August 10, 1978, upon application of Coleman, the Court on August 24, 1978, entered its Supplemental Order which granted Coleman a certification under 28 U.S.C. 1292(b), certifying that there was a controlling question of law as to which

there was a substantial ground for difference of opinion and that an immediate appeal from its order would materially advance the ultimate termination of litigation.<sup>4</sup>

As mentioned above, the appellate court affirmed the trial court rulings in this matter on January 31, 1979.

### REASONS FOR GRANTING THE WRIT

1. As to documents otherwise subject to an audit by an administrative agency of the United States,

1.(a) The decision of the court below is in conflict with an applicable decision of this Court because (1) the trial court may not order disclosure of grand jury documents without a showing of particularized need; (2) the holding of the *Interstate Dress Carriers* case (280 F.2d 52 (2nd Cir. 1960)) may not be applied to permit disclosure (a) where there is an ongoing grand jury investigation; (b) when there is proof that the ongoing grand jury investigation has been subverted; (c) when Rule 6(e), Federal Rules of Criminal Procedure does not authorize disclosure of grand jury documents even when such documents are otherwise subject to audit and inspection by an administrative agency.

In *U.S. v. Interstate Dress Carriers*,<sup>5</sup> the court held certain records which a grand jury had obtained by way of a subpoena duces tecum could be examined by the

4. See the Court's "Ruling on Letter Objections of Coleman American Companies Submitted In Camera" (entered August 14, 1978).

5. 280 F.2d 52, at p. 54 (2nd Cir. 1960). The court also, at p. 54, determined that Rule 6(e) was not violated in the circumstances of the case, further distinguishing it from the facts of the instant case. The case of *In re Grand Jury*, 24 Cr.L. 2171 (5th Cir. 1978), is not to the contrary, as that case involved disclosure of grand jury documents after the grand jury proceedings had terminated, and only government attorneys were authorized to use the grand jury materials.

Interstate Commerce Commission because this agency had a right under its regulations to inspect and audit such records regardless of grand jury proceedings.

However, it appears that the grand jury investigation in this case had ended, as the court noted that inspection by the ICC "will not impinge upon the secrecy of the grand jury proceedings," making this case distinguishable from the facts of the instant case, where an ongoing grand jury case was and is still in progress.<sup>6</sup>

And, a full reading of the *Interstate Dress Carriers* case indicates that the court was ... fact applying the standard of "particularized need".

However, the Court in the instant case did not apply the requirement of "particularized need" as to those documents which it ordered disclosure of pursuant to the holding in the *Interstate Dress Carriers* case.

In any event, the exception enunciated by the *Interstate Dress Carriers* case finds no support in Rule 6(e), Federal Rules of Criminal Procedure. Congress, in its recent consideration of the 1977 Amendment to Rule 6(e), noted that the 1977 Amendment was directed only to disclosures to Government personnel without a court order as to criminal investigations. Congress specifically cited the test set out in *U.S. v. Procter & Gamble*, 356 U.S. 677, at pp. 683-84 (1958) (which requires a showing of particularized need before disclosure of grand jury documents), as applicable when a court order was sought and made no

6. The facts of the *Interstate Dress Carriers* case may be distinguished also from the instant case in that the issues in the criminal investigation would necessarily be different from those in the civil aspects of the case, particularly since the claims of the banks against HEW would not be affected by any alleged conduct of Coleman. Compare, *In the Matter of the Grand Jury Investigation (General Motors Corp.)*, 210 F.Supp. 904 (S.D. N.Y. 1962).

mention of the *Interstate Dress Carriers* case. See 113 Congressional Record H-7867 (July 27, 1977); Senate Report No. 95-354, at 8 and Note 13, 1977 U.S. Code Congressional & Administrative News 1482.

Thus, the Court's holding below was in direct conflict with this Court's holding in *U.S. v. Procter & Gamble*, cited *supra*.

This Court in *U.S. v. Procter & Gamble* also held that a precondition of granting disclosure under Rule 6(e) was that there had been no abuse of the grand jury process. As the record reflects, the Honorable Trial Court in ordering disclosure as to certain of the Grand Jury documents declined to follow the holdings of *U.S. v. Procter & Gamble* and instead, it is respectfully urged, liberally applied the doctrine of the *Interstate Dress Carriers* case.<sup>7</sup>

Thus, the Court was in error in ordering disclosure of certain grand jury documents pursuant to the *Interstate Dress Carriers* case.<sup>8</sup>

1.(b) As to documents which were not otherwise subject to audit by an administrative agency of the United States, the order of the court below is in conflict with a decision of this Court and with decisions of other Courts of Appeals because (1) "administrative convenience" is not a sufficient showing of "particularized need", especially where the grand jury process was ongoing; (2) grand jury

7. Although the Court's Order (Exhibit E) did make a finding that no abuse of process was shown, and it appears that this finding applied to all of the documents in question for which disclosure was ordered, it is clear from the record that abuse of grand jury process was not a consideration of the court in ordering disclosure under the *Interstate Dress Carriers* case.

8. The Grand Jury documents ordered disclosed pursuant to the *Interstate Dress Carriers* case should not have been disclosed if the Court had applied the "particularized need" standard as to them. See Discussion, *infra*, regarding applicability of the "particularized need" standard to the facts of this case.

documents cannot be disclosed where there is a showing of abuse of the grand jury process; (3) when there was no showing that the documents were to be disclosed in a "judicial proceeding" within the meaning of Rule 6(e), Federal Rules of Criminal Procedure.

(1) The Trial Court's finding and order that a "particularized need" was shown as to certain documents was, it is respectfully urged, not justified on the facts of this case. (It is respectfully urged that this discussion as to the showing of "particularized need" should be considered by this Court as to all of the documents, even those ordered disclosed under the doctrine of the *Interstate Dress Carriers* case, since appellant contends that the showing of "particularized need" was necessary as to all documents.) This is so because all that was shown by the Government was that it would be more convenient for "HEW" to proceed with disclosure of the Grand Jury documents than by a new audit. The cases clearly hold that administrative convenience is not a sufficient showing of "particularized need" to justify disclosure of Grand Jury materials. See, e.g., *In re Grand Jury Proceedings*, 309 F.2d 440 (3rd Cir. 1962).

In any event, there was no showing of "particularized need" sufficient to overcome the policies underlying grand jury secrecy.

These policies were enunciated in *U.S. v. Procter & Gamble*, cited *supra*, at p. 681, N.6, as follows:

"(1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses

who may testify before grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammelled disclosures by persons who have information with respect to the commission of crimes; (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt." (Emphasis added.)

This case involves the first reported instance where a court has granted disclosure of grand jury materials while the grand jury was still investigating. As the Court in *Capitol Indemnity Corporation v. First Minnesota Construction Company*, 405 F.Supp. 929 (D. Mass. 1975), has noted:

"No case providing the United States Attorney free rein to use grand jury material in his preparation of a civil case while the grand jury investigation is still pending has been brought to the court's attention or disclosed by the court's research.

"In a strongly-worded opinion, Judge Frankel cautioned against the dual use of grand jury material for criminal and civil proceedings. In denying the United States attorney request that IRS agents be permitted access to grand jury material for the purpose of determining criminal or civil liability, he wrote

'It is my conclusion . . . that the grand jury's role is properly confined, and amply respected, when it is held empowered to conduct investigations that are in their inception exclusively criminal. To hold otherwise—to confer court approval upon the kind of concurrent criminal and civil inquiries projected by the instant application—would expand the already awesome powers of the grand jury beyond tolerable limits.' *United States v. Doe*, 341 F.Supp. 1350, 1352 (S.D.N.Y. 1972).

"Faced with similar issues, other courts have either suppressed the documents in the civil case, e.g., *In re April 1956 Term Grand Jury*, 239 F.2d 263, 272 (7th Cir., 1956), or more frequently, permitted equal access to the grand jury material, e.g., *United States v. Procter & Gamble Co.*, 187 F.Supp. 55, 64 (D.N.J. 1960). Neither of these after the fact approaches would appear as clear, certain and equitable as a rule precluding concurrent civil access to grand jury material without permission of the court.

'It is true, of course, that many or most areas of law enforcement involve the alternate or cumulative prospects of both civil and criminal proceedings by the Government. But this is no justification for allowing the intentional use of a strictly criminal weapon (with a potency supposedly justified by its grave function) for the combined purposes.' *United States v. Doe*, 341 F.Supp. at 1352.

"The aforesaid concerns are aggravated by the fact that in this case the United States Attorney's civil client is an administrative agency. Necessarily the case will be reviewed with HUD officials and attorneys. It is questionable whether such review should include grand jury material.

If it had been intended that the attorneys for the administrative agencies were to have free access to matters occurring before a grand jury, the rule [Rule 6(e)] would have so provided.

"Permitting an administrative agency access to grand jury material while the grand jury is still conducting its investigation creates a number of potential problems among them being erosion of congressional limitation on agency power, the possible chilling effect on

potential witnesses and undue agency influence on the course of grand jury inquiry.

"The more common occasion for administrative agency access to grand jury material is where the agency assists the United States Attorney in its presentment or evaluation. But even in such limited and controlled circumstances '[i]t is impossible to delineate, either from . . . the cases, or the Rule itself just what "types" of government agencies may, for purposes of Rule 6(e), assist the United States Attorney.' *In re Pflaumer & Sons, Inc.*, 53 F.R.D. 464, 475 n. 30 (E.D. Pa., 1971). (FN-2).

"(FN-2) The problem is discussed in detail in a comprehensive law review article. Note, *Administrative Agency Access to Grand Jury Materials*, 75 Colum.L. Rev. 162 (1975)."

Under these facts showing abuse of the grand jury process, disclosure should have been denied. Under the facts of the instant case, the policies against grand jury disclosure all should be applied in favor of Coleman. Coleman's name and business can be irrevocably tarnished by disclosure of the Grand Jury documents; "HEW" civil officials can use their knowledge to influence potential witnesses, and the course of the investigation. Moreover, it is not clear how the Trial Court's valiant attempts to prohibit unauthorized disclosure would be enforced as to individual "HEW" agents or other employees of "HEW" who were not party to these proceedings. In any event, after the fact contempt proceedings clearly would be of little or no benefit to Coleman.<sup>9</sup>

9. It is noted in this connection that the order entered by the Court for disclosure was too broad, as it was not shown why the Government had a "particularized need" for all the materials for which disclosure was sought.

(2) As noted above, *U.S. v. Procter & Gamble* clearly held that a showing of abuse of grand jury process would require denial of an application for disclosure of grand jury documents. Coleman clearly had such proof, and the Court was clearly in error for rejecting such evidence as irrelevant.

As was noted recently by the Sixth Circuit, there is a conflict of interest in a grand jury investigation between, on the one hand, the Department of Justice Attorneys, which is interested only in the criminal aspects of the case, and on the other hand, the Internal Revenue Service, which is interested in the civil aspects of the case. The Court held that the participation of an Internal Revenue Service Attorney in the Grand Jury proceedings constituted a conflict of interest such that the Grand Jury proceedings should be terminated. See *In re Grand Jury Subpoenas*, 573 F.2d 936 (6th Cir. 1978). Appellant understands that the panel decision in this case was reversed by En Banc Court on the ground that an interlocutory appeal in the facts of the case did not lie (see discussion, *infra*).<sup>10</sup> The Sixth Circuit case has peculiar applicability to the instant case, as Coleman has proffered evidence that the Grand Jury was already used to further the civil aspects of "HEW's" case. Coleman also had evidence that civil agents were actively participating in the criminal investigation of this case, including agents of the Compliance Division of "HEW".

10. The Court discussed with approval *Wood v. Georgia*, 370 U.S. 375 (1962), wherein Mr. Chief Justice Warren stated: "Historically, this body [the grand jury] has been regarded as a primary security to the innocent against hasty, malicious and oppressive prosecution; it serves the invaluable function in our society of standing between the accuser and the accused, whether the latter be an individual, minority group, or other, to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will." at p. 943.

(3) Finally, the Court ordered disclosure to "HEW" of Grand Jury materials as to administrative proceedings which may or may not result in judicial proceedings. Disclosure is proper as to matters "preliminary to a judicial proceeding" under Rule 6(e) only when judicial action is necessary following administrative proceedings. See discussion of cases in the case of *Special February 1971 Grand Jury v. Conlisk*, 490 F.2d 894 (7th Cir. 1973) at pp. 896-897. See also *In re Disclosure of Grand Jury Testimony (Troia)*, 580 F.2d 281 (8th Cir. 1978) (proceeding for disbaring lawyers and removing lawyers "designed to culminate in a judicial proceeding").<sup>11</sup> There was no showing in this case that judicial proceedings would necessarily follow or were even contemplated after administrative review and relief under Rule 6(e) should have been denied.

2. There is a conflict between the circuits as to whether an order granting disclosure of grand jury documents is an appealable order.

The Third Circuit (as did the Eighth Circuit implicitly in this case) has held that an interlocutory appeal under

11. As a matter of fact, some cases hold that the "judicial proceedings" referred to in Rule 6(e) must be federal court proceedings. See *U.S. v. Downey*, (D.C. Ill. 1961) 195 F.Supp. 581, 584; *U.S. v. Crolich*, (D.C. Ala. 1952) 101 F.Supp. 782, 784. If this Court follows the holdings in those cases, clearly disclosure of these grand jury materials for use in proceedings which are not presently before a federal court was clearly erroneous.

It is to be further noted that investigation by the federal agencies preliminary to ex parte administrative proceedings have been excluded from the reach of Rule 6(e). See *In re Grand Jury Proceedings*, 309 F.2d 440, 443-44 (3rd Cir. 1962); *Application of United Electrical, Radio and Machine Workers of America*, 11 F.Supp. 858, 866, Note 24 (S.D. N.Y. 1953), which questioned whether an investigation by the National Labor Relations Board (NLRB) is preliminary to or in connection with the judicial proceeding. See also *In re April, 1956 Term Grand Jury*, 239 F.2d 263, 271 (7th Cir. 1956), which held:

"We find nothing in the history of the grand jury to justify the perversion of its functions or machinery by a third person for the purpose of a civil proceeding. . . ."

the provisions of 28 U.S.C. 1292(b) does lie under these circumstances. See *In re Grand Jury Impaneled January 21, 1975*, 541 F.2d 373 (3rd Cir. 1976). See Comment, "Interlocutory Appeals in Criminal Cases: An Open But Closely Guarded Door", 66 Geo. L.J. 1163, at pp. 1168-1171 (1978). Other cases have held that mandamus under 28 U.S.C. Section 1651 lies under certain circumstances, to-wit: *In re Grand Jury Impaneled January 21, 1975*, 541 F.2d 373 (3rd Cir. 1976); *In re Grand Jury Investigation*, 338 F.Supp. 1379 (W.D. Pa. 1972); *In re Grand Jury Proceedings*, No. 78-1089 (1st Cir., July 11, 1978, at p. 8, Slip Opinion); Comment, "Interlocutory Appeals in Criminal Cases: An Open But Closely Guarded Door," 66 Geo. L.J. 1163, at pp. 1168-1171 (1978). In the alternative, this Court has jurisdiction to hear this matter as a petition for mandamus under the All Writs Statute, 28 U.S.C. Sec. 1651. Mandamus lies when a court of appeals has issues of unusual importance to the economical and efficient administration of justice; to correct errors or abuses on the part of district courts in grand jury proceedings; and where there are issues of first impression, all of which circumstances are present in the instant case. See *In re April, 1977 Grand Jury Subpoenas (General Motors)*, 573 F.2d 936 (6th Cir. 1978) (panel opinion), *reversed* (en banc), 584 F.2d 1366 (6th Cir. 1978); *Application of Johnson*, 484 F.2d 791, 794, at Note 2 (7th Cir. 1973); *U.S. v. U.S. District Court for the Southern District of West Virginia*, 238 F.2d 713, at 719 (4th Cir. 1956); *In re Grand Jury Proceedings*, No. 78-1089 (1st Cir. 1978), 480 F.2d 13 (1st Cir. 1978); *U.S. v. Briggs*, 514 F.2d 794, at 808 (5th Cir. 1975).

The Sixth Circuit has taken contrary views of both the use of mandamus and interlocutory appeal in these circumstances. *In re April, 1977 Grand Jury Subpoenas*, op. cit., pet. for cert. filed, 11/3/78, Case No. 78-739.

**CONCLUSION**

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

JAMES R. WYRSCH  
BERNARD CRAIG, JR.  
*Attorneys for Petitioner*

**APPENDIX A**

**UNITED STATES COURT OF APPEALS**  
**For the Eighth Circuit**

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No. 78-1688

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Coleman American Companies, Inc.,  
Appellant,

v.

United States of America,  
Appellee.

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Appeal from the United States District Court  
for the Western District of Missouri

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Submitted: January 12, 1979  
Filed: January 31, 1979

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Before BRIGHT and ROSS, Circuit Judges, and VAN  
SICKLE, District Judge.\*

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**PER CURIAM.**

In this appeal Coleman American Companies, Inc. (hereinafter Coleman) claims that the district court<sup>1</sup> erred granting the government's request for disclosure of certain

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\*The Honorable BRUCE M. VAN SICKLE, United States District Judge for the District of North Dakota, sitting by designation.

1. The Honorable William H. Becker, Senior District Judge, Western District of Missouri.

grand jury documents to the Department of Health, Education and Welfare for use in a civil case. The trial court certified the case to us under 28 U.S.C. § 1292(b). By order of September 22, 1978, this court permitted the interlocutory appeal.

In support of its contentions Coleman argues that:

1. The court erred in granting the government disclosure of certain of the grand jury documents because (a) grand jury documents may never be disclosed without a showing of particularized need, and (b) the holding of *United States v. Interstate Dress Carriers*, 280 F.2d 52 (2nd Cir. 1960), applied by the trial court in granting disclosure as to some of the documents requested by the government does not apply (1) when there is an ongoing grand jury investigation; (2) where there is or may be proof that the grand jury investigation has been subverted; and (3) because FED. R. CRIM P. 6(e) does not authorize disclosure of grand jury documents even when such documents are otherwise subject to audit and inspection by an administrative agency.

2. The trial court erred in ordering disclosure of certain grand jury documents under the facts of this case because (a) the only showing of "particularized need" by the government was that it would be administratively convenient for HEW to have the grand jury documents and administrative convenience does not constitute a showing of "particularized need," especially when the grand jury investigation was still ongoing; (b) the grand jury process had already been subverted by improper disclosure of grand jury documents by the government; and (c) disclosure was ordered for use by HEW in proceedings which were not "judicial proceedings" within the meaning of FED. R. CRIM. P. 6(e).

We have examined the record, the in camera files and the briefs of the parties. The facts and the law are adequately discussed in Judge Becker's three in camera orders of August 10, 1978, August 14, 1978, and August 24, 1978. We affirm the holdings of the district court for the reasons set forth in those three orders.

Affirmed.

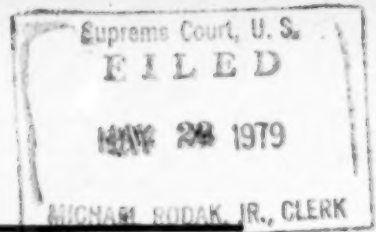
A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,  
EIGHTH CIRCUIT

[Not to be published.]

No. 78-1338



**In the Supreme Court of the United States**

OCTOBER TERM, 1978

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COLEMAN-AMERICAN COMPANIES, INC., PETITIONER

v.

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE EIGHTH CIRCUIT*

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**MEMORANDUM FOR THE UNITED STATES  
IN OPPOSITION**

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WADE H. MCCREE, JR.  
*Solicitor General*  
*Department of Justice*  
*Washington, D.C. 20530*

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*In the Supreme Court of the United States*

OCTOBER TERM, 1978

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No. 78-1338

COLEMAN-AMERICAN COMPANIES, INC., PETITIONER

v.

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE EIGHTH CIRCUIT*

---

**MEMORANDUM FOR THE UNITED STATES  
IN OPPOSITION**

---

Petitioner seeks review of the court of appeals' decision (Pet. App. A1-A3) allowing disclosure of certain of petitioner's records. Petitioner's contention is that the documents were in the custody of a federal grand jury and the government failed to show a requisite need for the information under Fed. R. Crim. P. 6(e)(2)(C)(i).<sup>1</sup>

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<sup>1</sup>Fed. R. Crim. P. 6(e)(2)(C)(i) reads:

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding;

\*\*\*

1. Petitioner operates correspondence and training schools, enrollment in which is financed in part through federally-insured student loans. In the past some of the insured student loans were made by a subsidiary of petitioner, and others were made by banks. In 1978 a federal grand jury empanelled in the Western District of Missouri investigated petitioner's student loan program; it subpoenaed loan records from petitioner and from one of the participating banks. Auditors from the Department of Health, Education, and Welfare (HEW) reviewed these records and prepared audit reports.

On June 22, 1978, HEW applied to the district court under Fed. R. Crim. P. 6(e)(2)(C)(i) for an order allowing disclosure of those subpoenaed documents and HEW audit reports in the custody of the grand jury, and for permission to use the knowledge of the HEW personnel acquired in the process of auditing the loan records. HEW stated that it needed these documents to defend itself in a related civil suit brought by petitioner's subsidiary and in other anticipated judicial proceedings.

The district court granted the application. It held that because HEW has independent authority to inspect petitioner's records under 20 U.S.C. 1082(a)(1) and 45 C.F.R. 177.62(d), the records were not "matters occurring before the grand jury" within the meaning of Rule 6(e). The court also held that HEW had shown a "particularized need" for the bank records, the HEW audit reports, and the HEW auditors' knowledge because of the judicial action pending against HEW.<sup>2</sup>

<sup>2</sup>Petitioner has neglected to reproduce the district court's opinions. We have reprinted them in an Appendix to this memorandum.

At petitioner's request, the district court certified its ruling to the court of appeals pursuant to 28 U.S.C. 1292(b) and stayed its order pending appeal. The court of appeals allowed petitioner's interlocutory appeal<sup>3</sup> and affirmed the district "for the reasons set forth in [the district court's] orders" (Pet. App. A3).

Petitioner did not seek or obtain a stay of the court of appeals' mandate. The mandate issued on February 26, 1979, and all the documents that HEW sought have since been disclosed to it.

2. Because the documents have been disclosed, the questions presented in the petition are moot. See *County of Los Angeles v. Davis*, No. 77-1553 (Mar. 27, 1979), slip op. 6. The records and other sources of information previously placed before the grand jury have been reviewed by HEW, and there are no means to reverse or limit that result. No part of this litigation remains to be resolved. Moreover, because the dispute centered on the particular documents presented to the grand jury, the questions are unlikely to be replicated. See *DeFunis v. Odegaard*, 416 U.S. 312 (1974).

<sup>3</sup>For this reason petitioner's allegation (Pet. 18-19) that there is a conflict among the circuits whether the district court's order could be appealed is immaterial. The disputed issue was resolved favorably to petitioner. If the Court were to grant the petition, however, we would argue that 28 U.S.C. 1292(b) does not authorize interlocutory appeals with respect to ongoing grand jury investigations. See *In re April 1977 Grand Jury Subpoenas (General Motors Corp.)*, 584 F. 2d 1366 (6th Cir. 1978) (en banc), cert. denied, No. 78-739 (Feb. 26, 1979). Moreover, because petitioner was not a "party" to the grand jury proceeding, it was not entitled to take an appeal. Compare *Ex parte Leaf Tobacco Board of Trade*, 222 U.S. 578, 581 (1911), with *Douglas Oil Co. v. Petrol Stops Northwest*, No. 77-1547 (Apr. 18, 1979) (Rehnquist, J., concurring).

Moreover, assuming *arguendo* that the controversy as a whole is not moot, the Court need not consider the question (Pet. 14-16) whether Rule 6(e) prohibits disclosure of documents in the custody of the grand jury merely because the grand jury is still sitting. The grand jury probe of this matter has ended. On April 24, 1979, an indictment was returned. A superseding indictment was returned on May 16, 1979. Thus, the question whether the lower courts properly ordered disclosure of materials while the grand jury was still in session is no longer presented.

In any event, the court of appeals' decision is correct. It properly held that, because HEW has an independent statutory authority to inspect petitioner's records, such inspection would not amount to "disclosure of matters occurring before the grand jury" within the meaning of Rule 6(e)(2)(C)(i). As the Second Circuit held in *United States v. Interstate Dress Carriers, Inc.*, 280 F. 2d 52, 54 (2d Cir. 1960):

\*\*\* [I]t is not the purpose of the Rule to foreclose from all future revelation to proper authorities the same information or documents which were presented to the grand jury. Thus, when testimony or data is sought for its own sake—for its intrinsic value in the furtherance of a lawful investigation—rather than to learn what took place before the grand jury, it is not a valid defense to disclosure that the same information was revealed to a grand jury or that the same documents had been, or were presently being, examined by a grand jury.

For that reason, neither *Interstate Dress Carriers* nor the decision below conflicts with *United States v. Procter & Gamble*, 356 U.S. 677 (1958), as petitioner contends (Pet. 11-12). *Procter & Gamble* held that

grand jury testimony was subject to Rule 6(e) because of the need to protect the secrecy of grand jury proceedings. *United States v. Procter & Gamble, supra.*, 356 U.S. at 682.<sup>4</sup> Here, HEW has independent authority to review the documents pursuant to its regulatory function—a fact petitioner recognizes (Pet. 8)—and that authority was not extinguished because the grand jury reviewed the records pursuant to its own authority.

There are three answers to petitioner's contentions (Pet. 12-14) about the remaining documents—the bank records regarding student loans, HEW's audit reports, and the HEW auditors' knowledge of the foregoing documents. First, because HEW is a part of the government, it does not need special permission to see the materials. *In re Grand Jury*, 583 F. 2d 128 (5th Cir. 1978.). Second, because the documents were created outside the grand jury, disclosure should not be evaluated under the standards of Rule 6. The disclosure simply does not reveal testimony or the nature of the proceedings. Third, HEW's request met the standard of particularized need for disclosure. The latter contention involved essentially a factual finding by the lower courts, review of which is unwarranted. *United States v. Reliable Transfer Co.*, 421 U.S. 397, 401 n.2 (1975); *Berenyi v. Immigration Director*, 385 U.S. 630, 635-636 (1967); *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949).<sup>5</sup>

<sup>4</sup>Like *Procter & Gamble, supra.*, this Court's recent decision in *Douglas Oil Co.* involved transcripts of grand jury proceedings. It thus is inapplicable to the present case.

<sup>5</sup>Petitioner contends that it has proof of "abuse of the grand jury process" (Pet. 16). The district court found to the contrary (App., *infra*) and there is no reason for this Court to review that determination.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. McCREE, JR.  
Solicitor General

MAY 1979

# APPENDIX A

No. 78-0444-CV-W-B

(IN CAMERA)

EXHIBIT C(1)

IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF MISSOURI  
WESTERN DIVISION

IN THE MATTER OF:

THE AUGUST 29, 1975, TERM GRAND JURY INVESTIGATION  
OF COLEMAN-AMERICAN COMPANIES, INC., ET AL.

## ORDER ALLOWING DISCLOSURE

After a hearing and objections on the record, *in camera* before me in my chambers, on June 26, 1978, upon due notice to all interested parties, at which James Wyrsh, Bernard D. Craig, Jr., and Richard Shteamer appeared on behalf of James Coleman and Coleman-American Companies, Inc., and Ronald S. Reed, Jr., Richard H. Zehring and Robert E. Larsen appeared on behalf of the United States and the moving party herein, no one having appeared on behalf of the Home State Bank; and after being duly advised in the premises, the Court now, in response to the pending Application for Court Order Allowing Disclosure of Matters Occurring Before a Grand Jury, finds, concludes and orders as detailed hereunder.

The Court finds and concludes that:

1. The grand jury process, pursuant to which the records sought to be disclosed were obtained, was in no way abused or subverted and that the documents set out in the Application herein were obtained in

good faith by grand jury subpoenas duces tecum as part of an ongoing criminal investigation in the Western District of Missouri.

2. Pursuant to 20 U.S.C. 1082(a)(1) and 45 C.F.R. 177.62(d) the Office of Education of the Department of Health, Education and Welfare was and is authorized to independently, administratively examine and analyze the following documents belonging to Coleman-American Companies, Inc., and that therefore said documents, for the purposes to be used pursuant to the Application, are not ~~matters~~ occurring before the grand jury. ~~(United States of America v. Interstate Dress Carriers, Inc., 280 F. 2d 52 (2d Cir. 1960):~~

- a. Coleman-American student confirmation report (OE Form 1072);
- b. Coleman-American student academic records;
- c. Coleman-American monthly training reports;
- d. Coleman-American student grade sheets;
- e. Coleman-American interest bills and manifests;
- f. All the documents listed on Exhibit "A" attached to this Order.

3. There is a particularized need by the Office of Education of the Department of Health, Education and Welfare for the use of the documents and information hereinafter listed in subparagraphs 3(A) and 3(B) and for the use of the audit reports and personal knowledge of the federal agents hereinafter named in

subparagraph 3(C) in the pending judicial proceeding entitled *Edutronics Systems International, Inc. v. Department of Health, Education and Welfare*, Case No. 77-0916-CV-W-3, now pending in the United States District Court for the Western District of Missouri, and for use of same preliminarily to certain judicial proceedings which may or will arise out of administrative claims filed with the Department of Health, Education and Welfare by the Commerce Bank of Kansas City, the American Bank and Trust, the American National Bank of St. Joseph, Missouri, the Broadway National Bank, the Civic Plaza National Bank, the Douglas State Bank, the Westgate State Bank and the Home State Bank, all such administrative claims having been filed in connection with certain federally-insured student loans generated by or for or in connection with Coleman-American Companies, Inc., and its educational subsidiaries; that such use is in the interests of justice as authorized by the provisions of Rule 6(e)(2)(C)(i) of the Federal Rules of Criminal Procedure.

#### DOCUMENTS

- A. 1. Coleman-American student confirmation reports (OE Form 1072);
2. Coleman-American student academic records;
3. Coleman-American monthly training reports;
4. Coleman-American student grade sheets;
5. Coleman-American interest bills and manifests;

6. All documents listed on Exhibit "A" attached to this Order.
- B. Certain documents produced pursuant to grand jury subpoena issued July 22, 1976, to Home State Bank, with a return date of July 27, 1976, including:
  1. Documents in folder captioned "American National Bank—Miscellaneous Correspondence";
  2. A number of OE Forms No. 1151;
  3. Documents in the folder captioned "Coleman-American Correspondence";
  4. Documents in folder captioned "MISC. H.S.B. Correspondence on Accounts";
  5. Documents in folder captioned "Agreements".
- C. 1. The knowledge and audit reports of Van R. Phillips, obtained during examinations of various records at 3435 Broadway, Kansas City, Missouri, from May 24, 1976, to May 28, 1976, and from June 13, 1976, to June 18, 1976;
2. The knowledge and audit reports of Phyllis Speck, obtained during examinations of various records at 3435 Broadway, Kansas City, Missouri, from May 24, 1976, to May 28, 1976, and from June 13, 1976, to June 18, 1976;

3. The knowledge and audit reports of Fred I. Kinney, obtained during examinations of various records at 3435 Broadway, Kansas City, Missouri, from May 24, 1976, to May 28, 1976, from June 13, 1976, to June 18, 1976, and from June 20, 1976, to July 1, 1976;
4. The knowledge and audit reports of Gerald Marshall, obtained during examinations of various records at 3435 Broadway, Kansas City, Missouri, from May 24, 1976, to May 28, 1976; from June 13, 1976 to June 18, 1976, and from June 20, 1976 to July 1, 1976;
5. The knowledge and audit reports of Alvin Guttman, obtained during examinations of various records at 3435 Broadway, Kansas City, Missouri, from June 13, 1976, to June 18, 1976, and from June 20, 1976, to July 1, 1976.

It is, therefore, ORDERED that:

1. The Office of Education of the United States Department of Health, Education and Welfare is allowed disclosure of all the knowledge and reports of the federal agents hereinabove set out and all the documents so set out in paragraph 3 above for use in and preliminarily to the aforementioned judicial and administrative proceedings;

2. The existence of the proceedings before the grand jury pursuant to which these documents were obtained, and any ongoing investigations involving the same be

kept secret and confidential in conformity with the Federal Rules of Criminal Procedure by all agents and attorneys for the United States who have participated therein, and now may be engaged in representation of the Department of Health, Education and Welfare in the pending related case in Division 3.

3. All papers and records of this proceeding on this Application including the transcript of the hearing hereof shall be kept under seal, to be opened and examined only upon order of a Court having jurisdiction to do so.

Dated at Kansas City, Missouri, this 10th day of August, 1978

/s/ William H. Becker

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WILLIAM H. BECKER  
SENIOR UNITED STATES DISTRICT JUDGE

No. 78-0444-CV-W-B

(IN CAMERA)

IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF MISSOURI  
WESTERN DIVISION

IN THE MATTER OF:

THE AUGUST 29, 1975, TERM GRAND JURY INVESTIGATION  
OF COLEMAN-AMERICAN COMPANIES, INC., ET AL.

*RULING ON LETTER OBJECTIONS OF  
COLEMAN-AMERICAN COMPANIES  
SUBMITTED UNDER IN CAMERA*

The United States moved by application for an order allowing disclosure of matters affecting Coleman-American Companies, Inc., among others. Notice of the motion and an opportunity to object and be heard was given to all affected parties.

A hearing was held on the motion at which only Coleman-American Companies, Inc. appeared by counsel.

After the hearing it was announced that the motion (application) of the United States would be granted. The United States was requested to submit a formal order granting the motion on notice to Coleman-American Companies, Inc., which was permitted an opportunity to submit objections to the form of the order by letter. The objections and the letter response thereto have been considered.

The proposed order submitted by the United States is approved and the objections hereto overruled with the following exceptions:

- (1) A supplemental order will be entered containing the requirements of the amended order adopted in *Robert Hawthorne, Inc. v. Director of Internal Revenue*, (E.D. Pa. 1976) 406 F. Supp. 1098 except these of subsections (7) and (8).
- (2) The proposed "new paragraph 4" submitted on pages 3 and 4 of the objections be added as a paragraph of the Supplemental Order.

The order submitted by the United States has been signed and filed under seal.

The United States is requested to submit under *in camera*, on notice to ColemanAmerican Companies, Inc., the Supplemental Order described above.

All proceedings and ruling in this action have been conducted and made *in camera*. All findings have been made under seal.

/s/ William H. Becker

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WILLIAM H. BECKER  
SENIOR JUDGE

Kansas City, Missouri

Date: 5-14-78

EXHIBIT E  
No. 78-0444-CV-W-B

(IN CAMERA)

IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF MISSOURI  
WESTERN DIVISION

IN THE MATTER OF:

THE AUGUST 29, 1975, TERM GRAND JURY INVESTIGATION  
OF COLEMAN-AMERICAN COMPANIES, INC., ET AL.

SUPPLEMENTAL ORDER  
ALLOWING DISCLOSURE

And now on this 24th day of August, 1978, in consideration of this Court's Ruling On Letter Objections Of Coleman-American Companies Submitted Under In Camera, dated August 14, 1978, the following Supplemental Order to the Court's Order Allowing Disclosure dated August 10, 1978, is herewith entered.

It is ORDERED that:

1. Each employee of the United States Department of Health, Education & Welfare utilized by attorneys for the government to review the grand jury materials as permitted by this Order shall be sworn to uphold the secrecy of any grand jury matters that may come to his or her attention during the course of this investigation. The United States Attorney shall provide written instructions to all such employees, making clear the limited nature of the United States Department of Health, Education & Welfare access to grand jury material. Any grand jury materials delivered at any

time to the physical custody of the United States Department of Health, Education & Welfare or any of its employees shall be segregated from general HEW files, secured and marked, and the United States Attorney shall so certify to the Court.

In connection with the investigation of Coleman-American Companies, Inc., by this or any successor grand jury, the United States Attorney shall keep a "Rule 6(e) Docket," recording *inter alia* the following: (1) the docket number and date of the 6(e) Order governing the investigation, and the identity of the judge issuing it; (2) the general description of the investigation as set forth in the government's application for the 6(e) Order; (3) the identity of each investigative target; (4) the identity of all agency personnel with access to the material; (5) the identity of the relevant agency supervisory personnel; (6) the identity of the Assistant United States Attorney(s) supervising the investigation; and (7) the date on which the use of such grand jury materials as described in paragraph 3 of this Order was terminated.

When the Department of Health, Education & Welfare has completed the use of the grand jury materials as described in paragraph 3 of the Order Allowing Disclosure, the United States Attorney shall so certify to the Court. The certification shall include a statement that all matters theretofore entrusted to the Department of Health, Education & Welfare have been returned to the United States Attorney for appropriate disposition. Such disposition shall include return of all original papers, records, documents and the like to their respective owners, unless such papers,

etc., have been made the subject of a judicial order of impoundment or unless application for such an order is made simultaneously with the filing of the certification.

2. The Court is of the opinion that the Order Allowing Disclosure in this case granting the government disclosure involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this Order may materially advance the ultimate termination of this litigation. This finding is made pursuant to 28 U.S.C. 1292(b) permitting interlocutory appeals. This Order permitting disclosure shall be stayed ten days from the date of the entry of this Order. If within said ten-day period Coleman-American makes application to the United States Court of Appeals for the Eighth Circuit for an order permitting an interlocutory appeal pursuant to Section 1292(b), Title 28, United States Code, this Order shall be automatically stayed pending disposition by the Court of Appeals of Coleman-American's application for an interlocutory appeal. In the event that the United States Court of Appeals for the Eighth Circuit grants Coleman-American's application for an interlocutory appeal, then the stay of this Court's Order permitting disclosure shall be extended until final disposition of Coleman-American's appeal. It is so

ORDERED.

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William H. Becker  
SENIOR JUDGE

KANSAS City Missouri

Dated: 8-24-78